

R. G. asks the Utah Labor Commission to review Administrative Law Judge George's denial of Mr. G.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

Mr. G. was injured in a traffic accident on July 27, 1999, as he drove his pickup truck to a Larsen Construction worksite. On February 12, 2001, Mr. G. filed an Application For Hearing with the Commission to compel Larsen Construction and its insurance carrier, the Workers Compensation Fund ("WCF"), to pay workers' compensation benefits for his injuries. Larsen and WCF denied liability on the grounds Mr. G.'s accident and injuries were not work-related.

Judge George conducted an evidentiary hearing on Mr. G.'s claim on September 18, 2001. On July 31, 2003, Judge George denied the claim, finding that Mr. G.'s accident and resulting injuries were not work-related and, therefore, not compensable under Utah's workers' compensation system.

Mr. G. now requests Commission review of Judge George's decision. Specifically, Mr. G. argues that, because his pickup truck was an instrumentality of his work for Larsen, his accident in that truck was work-related.

FINDINGS OF FACT

The Commission has carefully examined the evidentiary record in this matter and enters the following findings of fact.

Mr. G. owned a concrete business that he operated out of his home west of Cedar City. Over the years, he has done concrete work as a subcontractor for Larsen Construction on several projects. In early 1999, Larsen Construction won a contract for part of the "Millcreek" project in St. George. Larsen Construction's share of the project included more than \$1,000,000 of concrete work. However, the Millcreek contract required Larsen Construction to perform the work through employees, rather than subcontractors. For that reason, Larsen Construction hired Mr. G. to supervise its concrete crew. Mr. G. had authority to hire and fire employees, establish work schedules and duties, and direct performance of those duties.

Because Mr. G. was already established in the concrete business, he owned tools and materials necessary for the concrete work at the Millcreek project. He used his own pickup truck to transport the tools and materials between his home and the construction site. He also used his truck to transport material purchased from local vendors to the Millcreek site. On some occasions, Larsen Construction's owner rode with Mr. G. to pick up materials. On other occasions, Larsen

Construction employees used Mr. G.'s truck to pick up materials.

Larsen Construction agreed to pay Mr. G. \$15 per hour, plus 50% of the company's profits on the Millcreek concrete work. Larsen Construction also paid Mr. G. \$100 for gasoline expense. This compensation package was negotiated between Larsen Construction and Mr. G. to take into account Mr. G.'s use of his personal vehicle and tools on the Millcreek project.

In traveling between his home and the Millcreek site, Mr. G. could choose between two routes. One route headed west, then south, through Veyo and on to St. George. The other route headed east to Cedar City, then south to St. George. Travel time and distance were not substantially different between the two routes. Mr. G. preferred the Veyo route, but usually took the Cedar City route in order to meet with Larsen Construction staff in Cedar City or provide rides to Larsen Construction's concrete crew.

On July 27, 1999, Mr. G. was expecting delivery of cement to the Millcreek site. Additional forms had to be built before the concrete could be unloaded. Before dawn, Mr. G. loaded supplies into his truck and began driving to the Millcreek site by way of Cedar City. Mr. G. intended to pick up two or three crew members who lived in Cedar City and then pick up additional materials in St. George.

Three miles from his home, Mr. G. collided with an oncoming car. He suffered severe injuries that give rise to his current claim for benefits.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-401 of the Utah Workers Compensation Act requires employers and their insurance carriers to pay medical and disability benefits to employees injured by accident "arising out of and in the course of employment, wherever such injury occurred" Mr. G. contends he is entitled to benefits because the injuries he suffered in the traffic accident of July 27, 1999, arose out of and in the course of his employment by Larsen Construction.

As a rule, accidents that occur while an employee is traveling to and from work do not arise out of and in the course of employment and are not compensable under the workers' compensation system. VanLeeuwen v. Industrial Commission, 901 P.2d 281, 284 (Utah App. 1995). But there are exceptions to this rule. Among the exceptions is the principle that when an employee is required to bring his or her vehicle to the worksite for the use and benefit of the employer the vehicle becomes an instrumentality of the employer's work. The employee is therefore protected by the workers' compensation system while driving the vehicle to and from work. Bailey v. Utah State Industrial Commission, 398 P.2d 545, 547 (Utah 1965). Whether a vehicle is "an instrumentality of the employer's work" depends on the facts of the particular employment relationship.

The Utah Supreme Court has observed that "(s)cope-of-employment issues are in general highly fact-dependent. Indeed, our prior case law recognizes that 'whether or not the injury arises out of or within the scope of employment depends upon the particular facts of each case.'" (Citation omitted.) Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). The inherent difficulty

of scope-of-employment cases is aggravated when employers and employees fail to define the terms of the employment relationship before an accident occurs. It is usually necessary to determine the scope of an employee's employment by reference to actual conduct and the realities of the work setting.

In this case, Larsen Construction granted a large degree of authority to Mr. G. with respect to the concrete work at the Millcreek project. Larsen Construction knew of Mr. G.'s expertise in such matters and trusted his judgment, not only with the technical requirements of concrete work, but also over the logistics of the project. It appears Larsen Construction expected Mr. G. to use his expertise and judgment to marshal the necessary personnel, tools and materials in order to accomplish Larsen Construction's objectives. It also appears that Larsen Construction expected Mr. G. to use his own tools and equipment, including his pickup truck, to accomplish the project.

Mr. G.'s authority and responsibility over the Millcreek project is reflected by the fact that his compensation was not limited to an hourly wage, but included a right to share in any profits from the concrete portion of the project. Furthermore, Larsen Construction had actual knowledge of Mr. G.'s use of his pickup truck to accomplish Larsen Construction's objectives. For example, the owner of Larsen Construction sometimes rode in the pickup with Mr. G. to obtain supplies for the Millcreek project. Larsen Construction also paid Mr. G. \$100 to defray his gasoline expense. The Commission takes these facts as establishing Larsen Construction's recognition and encouragement of Mr. G.'s use of his truck as an instrument to accomplish Larsen Construction's work. Because the truck was an instrumentality of Mr. G.'s work for Larsen Construction, he was within the course and scope of his employment as he drove the truck on the morning of July 27, 1999.

Larsen Construction suggests that, even if Mr. G. was covered by the Act as he drove to and from the worksite, he lost that coverage because at the time of his accident he intended to deviate from the work-related travel in order to pick up his crew members in Cedar City to give them a ride to the work site.

While the Commission accepts Larsen Construction's general premise that a personal deviation from work-related travel is not covered by the Act, the specific facts of this case do not support such a result. Although two routes were available for Mr. G. to travel between his home and the Millcreek site, the evidence does not establish any substantial difference between them in terms of distance or travel time. Larsen Construction did not require Mr. G. to travel over one or the other route. In fact, on occasion Larsen Construction required Mr. G. to use the Cedar City route, which is the route on which the accident occurred. Furthermore, at the time of the accident, Mr. G. had not deviated from his work-related travel. Finally, Mr. G.'s intention of picking up crew members in Cedar City had the substantial work-related motive of insuring the concrete crew was at the work site to prepare for the upcoming concrete pour.

In summary, the Commission concludes that Mr. G.'s pickup truck was an instrumentality of Larsen Construction's work. It was necessary for Mr. G. to drive the pickup truck to worksite each day. Mr. G.'s motor vehicle accident on July 27, 1999, arose out of and in the course of that work-related travel. Consequently, Mr. G. is entitled to medical and disability benefits for his injuries as provided by the Act.

The Commission remands this matter to Judge George to determine the nature and amount of benefits Mr. G. is entitled to receive for his injuries. In light of the inordinate length of time Mr. G. has been waiting for resolution of this matter, Judge George is instructed to resolve the remaining issue with all possible speed.

ORDER

The Commission grants Mr. G.'s motion for review, sets aside Judge George's decision dated July 31, 2003, and substitutes this decision in its place. The Commission remands this matter to Judge George for further proceedings consistent with this decision. It is so ordered.

Dated this 31st day of March, 2004.

R. Lee Ellertson, Commissioner

